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NO. 83-713

In The

Supreme Court of the United States

RENE PICCARRETO and RICHARD J. MARINO,
Petitioners,

vs

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Rene Piccarreto, seeks a write of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 29, 1983.

Questions Presented For Review

Where the petitioner was tried and acquitted on substantive and conspiracy charges of being a member of a criminal enterprise under the RICO statute, can the Government charge the petitioner once again, six years later, on charges of being a member of the same enterprise, in the same time period, in the same geographic area, simply by substituting a different act of racketeering, of which the Government had full knowledge at the time of the prior indictment, without violating petitioner's constitutional Right under the Fifth Amendment not to be twice put in jeopardy for the same offense.

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Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Western District of New York is reported at 555 F.Supp. 1236 [1983].

Statement of Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 29, 1983 and this petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and the authority of *Abney v. U.S.*, 431 U.S. 651 [1977].

Constitutional Provision Involved

Fifth Amendment to the Constitution of the United States:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Statute Involved

Relevant portions of the 18 U.S.C. Sections 1961 and 1962(c) and (d):

Section 1961. Definitions

As used in this chapter —

(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (b) any act which is indictable under . . . the following provisions of Title 18, United States Code: . . . section 1341 (relating to mail fraud), . . . section 1503 (relating to obstruction of justice), . . . section 1951 (relating to . . . extortion) . . .;

(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Section 1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection [ ] . . . (c) of this section.

Statement of the Case

1. The current indictment charges the petitioner in substantive and conspiracy counts with participation in the affairs of a criminal enterprise under the Racketeering Influenced and Corrupt Organizations Act [RICO]. Under the indictment, in twelve "acts of racketeering" and in forty-five "overt acts" it is alleged that the enterprise engaged in various and diverse criminal activities including murder, obstruction of justice, extortion and arson. As set forth below, this petition is directed at that portion of the 1982 indictment which reaches back to 1973 and seeks to relitigate the petitioner's alleged participation in the enterprise's alleged orchestration of the murder of Vincent James Massaro.

2. In 1976 the petitioner and others were charged in the Western District of New York with substantive and conspiracy violations of the RICO statute under 18 U.S.C. 1962. The indictment alleged that the defendants were members of a criminal organization engaged in a number of arson-insurance fraud schemes. During the trial of that action testimony was brought forth showing that the aim of this organization was to earn money through various criminal and corrupt operations. A named co-conspirator in the 1976 indictment was one, Vincent James Massaro.

3. Also in 1976, the petitioner and others were charged in state court under substantive and conspiracy murder violations for causing the death of the same Vincent J. Massaro in 1973.

4. The key witnesses in both federal and state prosecutions were federal witness protection program members Angelo Monachino and "Spike" LaNovera. These two witnesses were developed in the Rochester area of New York during a joint federal and state investigation of organized crime. At both the

federal and state trials these two witnesses testified about the organization itself, the leadership, the chain of command, the swearing-in ceremonies, etc. There is no question but that *as of the return of the 1976 RICO indictment the federal authorities had full and complete knowledge of the allegation that the same organization named in the RICO indictment had ordered the killing of Vincent James Massaro.* Presumably the federal and state officials chose to divide the trials because of the joint nature of the investigation.

5. The petitioner was acquitted of all charges arising out of the 1976 RICO indictment following a jury trial.

6. The petitioner and others were convicted following a jury trial on the state homicide charges. That conviction was vacated and the indictment dismissed when it was discovered that several police officers gave perjured testimony in an effort to corroborate the testimony of LaNovera and Monachino. After serving some fourteen months in custody [from November 1976 to January 1978] the petitioner was released.

7. The current indictment was returned in 1982. It charges substantive and conspiracy RICO violations arising out of a claimed "gambling club extortion scheme." Essentially, the indictment deals with the alleged efforts of the jailed members of the organization to maintain control of the operation upon being released from prison. Eleven out of the twelve "acts of racketeering" and forty-two of the forty-five "overt acts" in support of the conspiracy deal with activity occurring after September of 1977.

8. In the current RICO indictment the authorities have attempted to reach back to the 1973 murder of Vincent James Massaro and include it as one of the underlying "acts of racketeering" and as three of the associated "overt acts" in support of the conspiracy charge. [A-6, A-12].

9. The petitioner's motion to dismiss the 1982 indictment as violative of his rights under the double jeopardy clause was denied by order of the United States District Court for the

Western District of New York on January 26, 1983. The order of the trial court was affirmed by the judgment of the United States Court of Appeals for the Second Circuit entered on August 29th, 1983.

10. The crux of the ruling below which is the subject of this petition is cited as follows:

> "In order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment. If either is different, there is no infirmity under the double jeopardy clause." [A-29].

11. Pursuant to this holding, the Government may carve up a single alleged RICO enterprise into multiple RICO prosecutions simply by arbitrarily picking and choosing to support each separate indictment with different "acts of racketeering" even though all such acts were intended to further the affairs of the enterprise.

12. By including in this 1982 RICO indictment an "act of racketeering" that occurred in 1973, namely the alleged enterprise ordered murder of Vincent James Massaro, when it is conceded that the Government knew of that allegation at the time of the return of the 1976 RICO indictment against the petitioner, the Government has violated the petitioner's Constitutional Right to be not twice put in jeopardy for the same offense.

Reasons for Granting the Writ

The decision of the Court below contradicts an established body of case law in the same Circuit [*United States v. Mallah*, 503 F.2d 971 [2nd Cir. 1974], cert. denied, 420 U.S. 995 [1975]], other circuits [for example, *Short v. United States*, 91 F.2d 614, 624 [4th Cir. 1937]] and this Court [*Sanabria v. United States*, 437 U.S. 54 [1978]] on the same issue: that is, the

scope of double jeopardy protection afforded an individual following an acquittal on an indictment charging a "continuing crime". A continuing crime is one which charges a defendant with a number of different acts over a period of time; for example, a criminal conspiracy, a gambling business, or, as in this case, a RICO enterprise.

The decision below also conflicts with the majority of cases in the RICO area on the generally accepted scope of a RICO indictment [*U.S. v. Scotto*, 641 F.2d 47, 54 [2nd Cir. 1980] and *U.S. v. Weisman*, 624 F.2d 1118 [2nd Cir. cert. denied, 449 U.S. 871 [1980]; and *U.S. v. Elliott*, 571 F.2d 880 [5th Cir. 1978]. These cases have held, I might add, in conformance with the Government's wishes, that RICO is specifically designed to include varied and seeming unrelated "acts of racketeering" in a single indictment as long as the Government can show that the acts are related to the affairs of the enterprise:

> "Under the statute [RICO], it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs." *Elliott*, id. at 902, 903.

Implicit in the ruling below is the holding that the alleged 1973 enterprise ordered murder of Vincent Massaro could not have been included in the 1976 RICO indictment. This finding is the only way that the Court could avoid the petitioner's claim of double jeopardy. This holding conflicts with the above cited cases and, if allowed to stand, will serve to limit the effectiveness of RICO legislation against organized crime, at least in the Second Circuit.

Given the explosion of RICO cases across the country and the certainty that this question will arise again, this court ought to now make a definitive statement as to the allowable scope of a RICO indictment and the effect of the double jeopardy clause of the Fifth Amendment on an individual following conviction or acquittal on a "continuing crime" such as RICO.

I

The Jeopardy Issue

The Court below has held that the Government may carve up a single RICO enterprise by merely alleging two predicate acts — sufficient to establish a pattern of racketeering under the statute — and, by holding in reserve other predicate acts, bring future RICO prosecutions against the same individuals in the same enterprise. The cases cited above have held that attempts by the Government to make multiple indictments out of a single conspiracy by alleging different overt acts, or by charging additional objects in the conspiracy, or by charging the violation of additional statutes [See *Mallah* and *Short*, supra]; or Government attempts to bring multiple indictments against a single gambling business by charging different means of wagering [See *Sanabria*, supra] are violative of the double jeopardy clause of the Fifth Amendment.

Mallah, supra, involved a conspiracy charge in violation of the Federal Narcotics Law. In that case the defendants had been tried and convicted on a narcotics conspiracy charge alleged to have occurred between January 1st, 1971 and June 14th, 1971. After that conviction the Government returned a second indictment charging the same defendants with violations of the Federal Conspiracy Law allegedly occurring between January, 1971 and June, 1973. *U.S. v. Mallah*, id at 982. The defense argued that jeopardy had attached after the first prosecution, because, in fact, the two conspiracies were actually the same. The Government took the following position:

> "The Government contends that because there were no named co-conspirators common to the two indictments, because different overt acts were alleged in each indictment, because the conspiracy below continued into 1973 whereas the conspiracy in the first indictment ended in May of 1971, and because there is a suggestion in the

> first indictment that the conspiracy extended to distributing narcotics to the customers in the Midwest whereas the proof in the second indictment establishes activity only in New York, the two conspiracies are distinct." id. at 982.

As in Mallah, the Government herein contends that although there is a time overlap in the fact pattern and although the alleged enterprise is the same in each indictment, the substance of the acts of racketeering are different and therefore there is no jeopardy problem. The Second Circuit rejected the Government's position in *Mallah* citing *Short v. United States,* supra:

> "Blanket charges of "continuing' conspiracy with named defendants and with 'other persons to the Grand Jurors unknown' fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the Government sees fit to send an indictment in this general form *charging a continuing conspiracy for a period of time it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred* and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes within its purview, if in fact the second indictment involves substantially the same conspiracy as the first . . . The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading." id at 985.

In *Sanabria v. United States,* 437 U.S. 34 [1978], the defendants were charged with another type of 'continuing crime', that is, with violations of the Federal Gambling Law under Title 18 U.S.C. Section 1955. Since this statute was enacted in conjunction with the RICO statute as part of the

orginal Crime Control Act of 1970, various portions thereof have been construed *in pari materia;* therefore, the legal definition of the term "business" as set forth in *Sanabria,* should have a bearing on the legal definition of the term "enterprise" as set forth in the RICO statute. In *Sanabria* the defendant was acquitted of the Section 1955 charge of running a gambling business by engaging in betting on horses. The Government then sought to charge the defendant under the same statute with running a gambling business by betting on numbers instead of on horses. The Court held that:

> "The Government having charged only a single gambling business, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the 'same offense'. Indeed, the Government's argument that these are discrete bases of liability warranting reprosecution following a final judgment of acquittal on one such 'discrete basis' is quite similar to an unsuccessful argument that it presented in *Braverman v. United States* . . . *Braverman* had been convicted of and received consecutive sentences on four separate counts of conspiracy, each count alleging a conspiracy to violate a separate substantive provision of the Federal Narcotics Law. The Government conceded that only a single conspiracy existed, as it concedes here that only a single gambling business existed; nonetheless, it urged that separate punishments were appropriate because the single conspiracy had several discrete objects. We firmly rejected that argument.
>
> > 'The precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.'

> The same reasoning must also apply where the essence of the crime created by Congress is participation in a 'business' rather than participation in an 'agreement'. *Sanabria* id at 437 U.S. 73, 74.

Petitioner asserts that the Government could have included the 1973 Massaro homicide as one of the underlying acts of racketeering in the 1976 indictment. By holding this act of racketeering in reserve and attempting to use it in 1982 the Government, based on the cases cited above, has violated the petitioner's right not be placed twice in jeopardy for the same crime.

II.

Conflict in the Circuits on the Scope of A Rico Indictment.

RICO was created to combat organized [See *U.S. v. Elliott,* 571 F.2d 880, 902 [5th Cir. 1978]].

> "Through RICO Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing inadequate conspiracy rationales with the new statutory concept: The enterprise." id at 903.

The Government can include in a single RICO indictment various and distinct acts of racketeering as long as there is some relationship between the proscribed acts and the enterprise itself [See *U.S. v. Scotto,* 641 F.2d 47, 54 [2nd Cir. 1980] and *U.S. v. Weisman,* supra]. Implicit in the ruling of the Court below is a finding that the Government could not have included the 1973 Massaro murder as one of the underlying acts in the 1976 indictment. This holding clashes with the above cited cases and, if allowed to stand, would limit the Government's continuing attempt to combat organized crime.

In *Elliott,* supra, the Government was allowed to join such varied allegations as arson, counterfeit automobile titles and

stolen cars, thefts from interstate trucking, efforts to influence a jury trial, murder, intimidation of witnesses, theft from truck terminals, illegal drug transactions, and various burglaries into a single RICO enterprise indictment. In *Turkette v. United States,* 452 U.S. 576 [1981] the single RICO enterprise indictment included acts of racketeering such as illegal trafficking in narcotics, arsons, use of the mail to defraud insurance companies, bribing police officers, and attempting to influence witnesses in state court proceedings. *Scotto,* supra, and *Weisman,* supra, also involved court approval of varied acts of racketeering in a single RICO indictment.

> As noted in *Stofsky,* 409 F.Supp. 609 [S.D.N.Y. 1973] aff'd. on other grounds, 527 F.2d 237 [2nd Cir. 1975], cert. denied, 429 U.S. 819 [1976], the statutory language does not expressly require that the predicate acts of racketeering be specifically "related' to each other and we find no affirmative evidence in the legislative history from which we should infer such a requirement . . . Most importantly, the predicate acts constituting a 'pattern of racketeering activity' must all be done in the conduct of the affairs of an 'enterprise'. Thus, the enterprise itself supplies a significant unifying link between the various predicate acts specified in Section 1961 [1] and may constitute a 'pattern of racketeering activity'. See *U.S. v. Weisman,* id. at 1122.

The ruling of the Court below, implicitly holding that the 1973 Massaro homicide could not have been included in the 1976 RICO indictment, contradicts the case law above cited and should be reviewed by this Court.

Conclusion

Petitioner has never argued that once tried for being a member of an enterprise under RICO he can never again be tried for such a violation regardless of the nature of subsequent misconduct [A-31].

If Petitioner is successful in this appeal, he recognizes that the Government will immediately re-indict him for all eleven "acts of racketeering" and all forty-two "overt acts" included in this indictment except for those which deal with those acts known to the Government at the return of the 1976 indictment [namely the Massaro homicide allegations]. Such a subsequent indictment would be valid and not in violation of the Petitioner's Fifth Amendment rights.

Our position is simply that, by attempting to relitigate Petitioner's connection to the 1976 enterprise which allegedly ordered the murder of Vincent Massaro, when he has already been tried and acquitted under such an allegation, the Government is violating Petitioner's Constitutional Rights under the Fifth Amendment. The ruling of the Court below is in sharp conflict with rulings in the same Circuit, with rulings in other Circuits, and with the ruling of this Court on the same issue and it ought to be reviewed for further guidance of all parties.

Respectfully submitted,

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EXHIBITS

EXHIBIT A

Special Grand Jury 82-1
Impanelled October 20, 1981 Term

18 U.S.C. 1962(c),
1962(d), 1963 and 2

IN THE DISTRICT COURT OF THE UNITED STATES
For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

SAMUEL J. ROSSOTTI, a/k/a "Red"; RENE PICCARRETO; RICHARD J. MARINO; THOMAS E. MAROTTA; JOSEPH R. ROSSI, a/k/a "The Mop"; ANTHONY M. COLOMBO; DONALD J. PAONE; JOSEPH J. TRIESTE; JOSEPH J. LaDOLCE, a/k/a JOSEPH J. LoDOLCE; JOHN M. TRIVIGNO, a/k/a "Flap"

The Grand Jury charges:

INTRODUCTION

That at all times material to the indictment herein:

THE ENTERPRISE

(a) There existed in the Western District of New York, a criminal organization which constituted an Enterprise as that term is defined in Title 18, United States Code, Section 1961(4), namely, a group of individuals associated in fact.

(2) The said Enterprise possessed an internal structure, which included positions of leadership, membership, association and employment; the leadership positions included the positions of "Boss", "Underboss", "Counselor", and "Captain".

PURPOSES OF THE ENTERPRISE

(3) The purposes of the said Enterprise consisted of the following:

(a) Obtaining monies for the said Enterprise and its membership by engaging in illegal acts, including among others, the extortion of various gambling clubs in the Rochester, New York area:

(b) Directing and controlling the criminal activities of its membership, by using illegal means, including among others, acts and threats involving murder;

(c) Protecting the activities and affairs of the said Enterprise from rival and competing individuals and groups by using illegal means, including among others, acts and threats involving murder and arson; and

(d) Avoiding and thwarting investigations of the said Enterprise's activities and affairs and prosecution of the said Enterprise's membership by committing illegal acts, including among others, acts and threats involving murder and the obstruction of justice.

MEANS AND METHODS

(4) In order to accomplish the purposes of the said Enterprise, the defendants and others, both known and unknown to the Grand Jury, utilized among others, the following means and methods:

(a) *Acts and threats involving murder*

As used herein, *murder* means intentionally causing the death of another person as set forth in New York Penal Law Section 125.25, and acts and threats involving murder include: accessory to murder; attempted murder; conspiracy to commit murder; and solicitation of murder as set forth in New York Penal Law Sections 20.00, 110.00, 105.15, and 100.10, respectively;

(b) *Acts and threats involving arson*

As used herein, *arson* means the intentional damaging of a building by starting a fire or by causing an explosion, or both as set forth in New York Penal Law Section 150.10, and acts and threats involving arson include: accessory to attempted arson; attempted arson; and conspiracy to commit arson; as set forth in New York Penal Law Sections 20.00, 110.00, and 105.10, respectively;

(c) *Interference with commerce by Extortion*

As used herein, *Interference with commerce by extortion* means the obstructing, delaying and affecting commerce, and the movements of articles and commodities in commerce between points in New York State and points outside New York State, by the obtaining of property from another, with his consent, induced by wrongful use of actual and threatened force, violence and fear, and by attempting and conspiring so to do, as set forth in Title 18, United States Code, Section 1951; and

(d) *Obstruction of Justice*

As used herein, *obstruction of justice* means (1) corruptly, and by threats of force, endeavoring to influence, intimidate and impede any witness in any court and Grand Jury of the United States, and (2) corruptly, and by threats and force, influencing, obstructing, and impeding, and endeavoring to influence, obstruct and impede the due administration of Justice, as set forth in Title 18, United States Code, Section 1503.

ROLES OF THE DEFENDANTS

(5) From sometime prior to February 1, 1971, up to sometime in approximately June or July of 1972, the exact dates being to the Grand Jury unknown, the Defendant SAMUEL J. RUSSOTTI was the "Counselor" of the said Enterprise; and from sometime in approximately June or July of 1972, the exact date being to the Grand Jury unknown, up to

and including the date of the Indictment herein, the Defendant SAMUEL J. RUSSOTTI was the "Boss" of the said Enterprise.

(6) From sometime prior to February 1, 1971, up to sometime in approximately June or July of 1972, the exact dates being to the Grand Jury unknown, the Defendant RENE PICCARRETO was the "Underboss" of the said Enterprise; and from sometime in June or July of 1972, the exact date being to the Grand Jury unknown, up to and including the date of the Indictment herein, the Defendant RENE PICCARRETO was the "Counselor" of the said Enterprise.

(7) From sometime in approximately June or July of 1972, up to approximately April of 1978, the exact dates being to the Grand Jury unknown, the Defendant RICHARD J. MARINO was a "Captain" in the said Enterprise; and from approximately late April of 1978, the exact date being to the Grand Jury unknown, up to and including the date of the Indictment herein, the Defendant RICHARD J. MARINO was the "Underboss" of the said Enterprise.

(8) From sometime prior to February 1, 1971, up to approximately April of 1978, the exact dates being to the Grand Jury unknown, the Defendant JOSEPH R. ROSSI was a member of the said Enterprise; and from approximately April of 1978, the exact date being to the Grand Jury unknown, up to and including the date of the Indictment herein, the Defendant JOSEPH R. ROSSI was a "Captain" in the said Enterprise.

(9) From sometime in approximately June or July of 1972, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of the Indictment herein, the Defendant THOMAS E. MAROTTA was a "Captain" in the said Enterprise.

(10) From sometime in approximately April of 1978, up to

approximately December of 1978, the exact dates being to the Grand Jury unknown, the Defendant ANTHONY M. COLOMBO was employed by and associated with the said Enterprise; and from approximately December of 1978, the exact date being to the Grand Jury unknown, up to and including the date of the Indictment herein, the Defendant ANTHONY M. COLOMBO was a member in the said Enterprise.

(11) From sometime prior to June of 1975, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of the Indictment herein, the Defendant DONALD J. PAONE was a member in the said Enterprise.

(12) From sometime prior to June of 1975, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of the Indictment herein, the Defendant JOSEPH J. TRIESTE was a member in the said Enterprise.

(13) From approximately September of 1977, up to approximately December of 1978, the exact dates being to the Grand Jury unknown, the Defendant JOSEPH J. LaDOLCE was employed by and associated with the said Enterprise; and from approximately December of 1978, the exact date being to the Grand Jury unknown, up to and including the date of the Indictment herein, the Defendant JOSEPH J. LaDOLCE was a member in the said Enterprise.

(14) From approximately September of 1977, the exact date being to the Grand Jury unknown, up to and including the date of the Indictment herein, the Defendant JOHN M. TRIVIGNO was employed by and associated with the said Enterprise.

COUNT ONE

The Grand Jury Further Charges:

(1) The Grand Jury realleges Paragraphs 1 through 14 of the Introduction hereto as if more fully set forth herein and incorporates the said Introduction herein by reference.

(15) From on or about February 1, 1971, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of this Indictment, in the Western District of New York and elsewhere, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, DONALD J. PAONE, JOSEPH J. TRIESTE, JOSEPH J. LaDOLCE, JOHN M. TRIVIGNO, the Defendants herein, and John N. Fiorino (now deceased) and Salvatore Gingello (now deceased), and others both known and unknown to the Grand Jury, being persons employed by and associated with the said Enterprise, did unlawfully, wilfully and knowingly conduct and participate directly and indirectly, in the affairs of the said Enterprise, which Enterprise was engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity as that term is defined in Title 18, United States Code, Section 1961(5).

ACTS OF RACKETEERING

(16) The racketeering activities as defined in Title 18, United States Code, Sections 1961(1)(A) and (1)(B), committed by the said Defendants and others consisted of the following acts:

(a) Acts Involving The Murder Of Vincent James Massaro

That from approximately October of 1973, and continuing thereafter up to and including on or about November 23, 1973, the exact dates being to the Grand Jury unknown, the

Defendants, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, and others both known and unknown to the Grand Jury, did solicit the murder and conspire to murder Vincent James Massaro, and on or about November 23, 1973, did murder Vincent James Massaro, in violation of New York Penal Law, Sections 125.25, 100.10, 20.00, and 105.15.

(b) Acts Involving The Attempted Murder Of Rosario Chirico

That from on or about April 23, 1978, and continuing thereafter up to and including on or about May 25, 1978, the exact dates being to the Grand Jury unknown, the Defendants, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH J. TRIESTE, JOHN M. TRIVIGNO, and others both known and unknown to the Grand Jury, did solicit the murder and conspire to murder Rosario Chirico, and on or about May 25, 1978, did attempt to murder Rosario Chirico, in violation of New York Penal Law, Sections 125.25, 110.00, 105.15, 100.10, and 20.00.

(c) Acts Involving The Attempted Murder Of Dominic Celestino

That from on or about April 23, 1978, and continuing thereafter up to and including on or about June 20, 1978, the exact dates being to the Grand Jury unknown, the defendants, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH J. TRIESTE, JOHN M. TRIVIGNO, and others both known and unknown to the Grand Jury, did solicit the murder and conspire to murder Dominic Celestino, and on or about June

18, 1978, did attempt to murder Dominic Celestino, in violation of New York Penal Law, Sections 125.25, 110.00, 105.15, 100.10, and 20.00.

(d) Acts Involving the Murder Of Thomas Didio

That from on or about April 23, 1978, and continuing thereafter up to and including on or about July 6, 1978, the exact dates being to the Grand Jury unknown, the Defendants, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, DONALD J. PAONE, JOSEPH J. TRIESTE, JOSEPH J. LaDOLCE, JOHN M. TRIVIGNO, and others both known and unknown to the Grand Jury, did solicit the murder and conspire to murder Thomas Didio, and on or about July 6, 1978, did murder Thomas Didio, in violation of New York Penal Law, Sections 125.25, 100.10, 20.00, and 105.15.

(e) Acts Involving The Attempted Murder And Obstruction of Justice Re: Angelo DiMarco

(1) That from on or about January 25, 1979, and continuing thereafter up to and including on or about March 13, 1979, the exact dates being to the Grand Jury unknown, the Defendants, RENE PICCARRETO, RICHARD J. MARINO, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, DONALD J. PAONE, JOSEPH J. LaDOLCE and others both known and unknown to the Grand Jury, did solicit the murder and conspire to murder Angelo DiMarco, and on or about March 13, 1979, did attempt to murder Angelo DiMarco, in violation of New York Penal Law Sections 125.25, 110.00, 105.15, 100.10, and 20.00.

(2) That from on or about January 25, 1979, and continuing thereafter up to and including approximately April of 1979, the exact dates being to the Grand Jury unknown, the Defendants,

RENE PICCARRETO, RICHARD J. MARINO, JOSEPH R. ROSSI, ANTONY M. COLOMBO, DONALD J. PAONE, JOSEPH J. LaDOLCE and others both known and unknown to the Grand Jury, did corruptly endeavor to obstruct Justice by endeavoring to murder Angelo DiMarco, a witness before the October 1977 Session of the United States Grand Jury for the Western District of New York, in violation of Title 18, United States Code, Sections 1503 and 2.

(f)Acts Involving The Obstruction Of Justice Re: Vincent Rallo

That from on or about March 13, 1979, and continuing thereafter up to and including on or about March 31, 1981, the exact dates being to the Grand Jury unknown, the Defendant, RICHARD J. MARINO, and others both known and unknown to the Grand Jury, did obstruct justice by corruptly counselling Vincent Rallo, a witness before the May 1980 Session of the United States Grand Jury for the Western District of New York, at Rochester, New York, to invoke his Fifth Amendment privilege against self-incrimination and to provide false testimony to the said Grand Jury, in violation of Title 18, United States Code, Sections 1503 and 2.

(g) Acts Involving The Extortion Of The Caserta Social And Political Club

That from on or about December 1, 1977, and continuing thereafter up to approximately March of 1979, the exact dates being to the Grand Jury unknown, the Defendants, SAMUEL J. RUSSOTTI, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, JOHN M. TRIVIGNO, and others both known and unknown to the Grand Jury, did unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in commerce between points in New York State and points outside New York State by

extortion, and attempting and conspiring to do so; that is, the obtaining of monies from the agents, owners, employees, representatives and persons associated with the Caserta Social and Political Club (also known as "44 Club"), 44 Lake Avenue, Rochester, New York, with their consent, induced by the wrongful use of actual and threatened force, violence and fear to include fear of economic harm, in violation of Title 18, United States Code, Sections 1951 and 2.

(h) Acts Involving The Extortion Of The Young Men's Social Club

That from on or about December 1, 1978 and continuing thereafter up to and including on or about December 17, 1981, the exact dates being to the Grand Jury unknown, the Defenants, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, JOSEPH R. ROSSI, DONALD J. PAONE, and others both known and unknown to the Grand Jury, did unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in commerce between points in New York State and points outside New York State by extortion, and attempting and conspiring to do so; that is, the obtaining of monies from the agents, owners, employees, representatives, and persons associated with the Young Men's Social Club (also known as "Lyell Avenue Social Club" and "Torpey's Joint"), 253 Lyell Avenue, Rochester, New York, with their consent, induced by the wrongful use of actual and threatened force, violence and fear to include fear of economic harm, in violation of Title 18, United States Code, Sections 1951 and 2.

(i) Acts Involving The Attempted Arson Of Trolley Collision

That from on or about April 23, 1978, and continuing thereafter up to and including sometime in December of 1978,

the exact dates being to the Grand Jury unknown, the Defendants, SAMUEL J. RUSSOTTI, JOSEPH R. ROSSI, DONALD J. PAONE and others both known and unknown to the Grand Jury, did conspire to commit arson and did attempt to commit arson of a business owned and operated by Rosario Chirico known as "Trolley Collision", located in a building at 5 Fromm Place, Rochester, New York, in violation of New York Penal Law Sections 150.10, 110.00, 105.10 and 20.00.

(j) Acts Involving The Obstruction Of Justice
Re: Robert R. Brucato

(1) That from on or about March 13, 1979, and continuing thereafter up to sometime in approximately April of 1979, the exact dates being to the Grand Jury unknown, the Defendant, RICHARD J. MARINO, and others both known and unknown to the Grand Jury, did obstruct Justice by corruptly counselling and advising Robert R. Brucato, a witness before the October 1977 Session of the United States Grand Jury for the Western District of New York, at Rochester, New York, to provide false testimony to the said Grand Jury, in violation of Title 18, United States Code, Sections 1503 and 2.

(2) That from on or about May 19, 1980, and continuing thereafter up to approximately October 15, 1980, the exact dates being to the Grand Jury unknown, the Defendant, RICHARD J. MARINO, and others both known and unknown to the Grand Jury, did obstruct Justice by corruptly counseling and advising Robert R. Brucato, a witness before the May 1980 Session of the United States Grand Jury for the Western District of New York, at Rochester, New York, to provide false testimony to the said Grand Jury, in violation of Title 18, United States Code, Section 1503.

ALL of the foregoing being in violation of Sections 1962(c), 1963 and 2 of Title 18, United States Code.

COUNT TWO

The Grand Jury Further Charges:

(14) The Grand Jury realleges Paragraphs 1 through 14 of the Introduction hereto as if more fully set forth herein and incorporates the said Introduction herein by reference.

(15) That from on or about February 1, 1971, the exact date being to the Grand Jury unknown, and continuing thereafter, up to and including the date of this indictment, in the Western District of New York and elsewhere, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, DONALD J. PAONE, JOSEPH J. TRIESTE, JOSEPH J. LaDOLCE, JOHN M. TRIVIGNO, the Defendants herein, John N. Fiorino (now deceased), Salvatore Gingello (now deceased), and others both known and unknown to the Grand Jury, being persons employed by and associated with the said Enterprise, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together, with each other and with others, to violate Title 18, United States Code, Section 1962(c); namely, to unlawfully conduct and participate, directly and indirectly, in the affairs of the said Enterprise, which Enterprise was engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961(5).

(16) It was a part of the conspiracy that during the aforesaid period, the said defendants and others, would agree to engage in acts of racketeering as defined in Title 18, United States Code, Sections 1961(1)(A) and (1)(B). The factual allegations of said acts of racketeering which the said Defendants and others agreed to engage in are set forth in paragraphs 16(a) through (j), inclusive, of Count One of this Indictment, and which factual allegations are realleged as if more fully set forth herein and are incorporated herein by reference.

OVERT ACTS

And, during the aforesaid period, the said Defendants, and others, committed the following overt acts, among others, in furtherance of the said conspiracy and in order to effectuate the objects and purposes thereof, to wit:

(1) Between on or about June 5, 1972, and on or about July 1972, the exact date being to the Grand Jury unknown, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA and Salvatore Gingello met with Angelo Monachino, Eugene DiFrancesco and Vincent James Massaro at the home of SAMUEL J. RUSSOTTI.

(2) On or about November 23, 1973, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO and Salvatore Gingello met with Eugene DiFrancesco, Angelo Monachino and Joseph LaNovara.

(3) On or about November 23, 1973, Eugene DiFrancesco killed Vincent James Massaro.

(4) Sometime in September of 1977, the exact date being to the Grand Jury unknown, Anthony Oliveri and Thomas Taylor met with Salvatore Gingello at Comstock, New York.

(5) On or about September 19, 1977, JOSEPH R. ROSSI, JOSEPH J. TRIESTE, DONALD J. PAONE, JOSEPH J. LaDOLCE, JOHN M. TRIVIGNO, John N. Fiorino and others, met with Dominic Celestino, Thomas Didio, Angelo Vaccaro and others at the Blue Gardenia Restaurant in Rochester, New York.

(6) On or about September 22, 1977, Anthony Oliveri and Thomas Taylor met with Salvatore Gingello at Danemora, New York.

(7) On or about December 27, 1977, JOSEPH R. ROSSI,

JOSEPH J. LaDOLCE, DONALD J. PAONE and John N. Fiorino fired gunshots at Thomas Didio and Angelo Vaccaro.

(8) On or about April 23, 1978, SAMUEL J. RUSSOTTI, RICHARD J. MARINO, JOSEPH R. ROSSI, JOSEPH J. TRIESTE, DONALD J. PAONE, John N. Fiorino, Anthony Oliveri and others met at the home of John N. Fiorino, Irondequoit, New York.

(9) On or about April 24, 1978, SAMUEL J. RUSSOTTI and RENE PICCARRETO met at the home of SAMUEL J. RUSSOTTI, Irondequoit, New York.

(10) Sometime in late April of 1978, the exact date being to the Grand Jury unknown, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, JOSEPH R. ROSSI, THOMAS E. MAROTTA, JOSEPH J. TRIESTE, DONALD J. PAONE, and John N. Fiorino met at the home of JOSEPH R. ROSSI, Penfield, New York.

(11) Sometime in May of 1978, the exact date being to the Grand Jury unknown, SAMUEL J. RUSSOTTI and Vincent Rallo met at the home of SAMUEL J. RUSSOTTI, Irondequoit, New York.

(12) On or about May 16, 1978, Anthony Oliveri traveled to the vicinity of Kuhn Road, Greece, New York to surveil Rosario Chirico.

(13) On or about May 21, 1978, DONALD J. PAONE and Joseph Geniola went to the Yahambas Social Club, 214 Franklin Street, Rochester, New York.

(14) On or about May 21, 1978, George Trieste and Edward Kramer went to the Caserta Social and Political Club, 44 Lake Avenue, Rochester, New York.

(15) On or about May 23, 1978, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, JOHN M. TRIVIGNO and Anthony Oliveri had a meeting.

(16) On or about May 23, 1978, ANTHONY M. COLOMBO, JOHN M. TRIVIGNO and Anthony Oliveri traveled to the area of Long Pond and Kuhn Roads, Greece, New York.

(17) On or about May 24, 1978, JOHN M. TRIVIGNO, George Trieste and others went to the Caserta Social and Political Club, 44 Lake Avenue, Rochester, New York.

(18) On or about May 25, 1978, ANTHONY M. COLOMBO, John N. Fiorino and Anthony Oliveri traveled to the area of Long Pond and Kuhn Roads, Greece, New York.

(19) On or about May 25, 1978, ANTHONY M. COLOMBO fired a shot at Rosario Chirico.

(20) Sometime in late May of 1978, the exact date being to the Grand Jury unknown, Vincent Rallo and RICHARD J. MARINO met at the home of RICHARD J. MARINO in Irondequoit, New York.

(21) Between on or about May 25, 1978, and on or about June 17, 1978, the exact date being to the Grand Jury unknown, RICHARD J. MARINO, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, and Anthony Oliveri traveled to Brighton, New York.

(22) On or about June 11, 1978, RICHARD J. MARINO, John N. Fiorino and Vincent Rallo met at the home of RICHARD J. MARINO in Irondequoit, New York.

(23) On or about June 15, 1978, RICHARD J. MARINO, JOSEPH R. ROSSI, and John N. Fiorino met with Vincent Rallo at the Rallo Insurance Agency.

(24) On or about June 15, 1978, RICHARD MARINO caused Department of Motor Vehicle documents to be prepared reflecting the sale of a certain 1970 Chevrolet.

(25) On or about June 18, 1978, JOSEPH R. ROSSI, AN-

THONY M. COLOMBO and Anthony Oliveri traveled to Todd Mart Plaza, Rochester, New York.

(26) On or about June 18, 1978, RICHARD J. MARINO, JOSEPH R. ROSSI, DONALD J. PAONE, JOSEPH J. TRIESTE, JOHN M. TRIVIGNO, John N. Fiorino, Anthony Oliveri and others met at the home of RICHARD J. MARINO in Irondequoit, New York.

(27) On or about June 19, 1978, JOSEPH J. TRIESTE, JOHN M. TRIVIGNO, and Robert Palmiere traveled to the vicinity of the Irondequoit Town Hall, Irondequoit, New York.

(28) On or about June 20, 1978, RICHARD J. MARINO, JOSEPH R. ROSSI, THOMAS E. MAROTTA, DONALD J. PAONE, John N. Fiorino, Anthony Oliveri and others attended a court proceeding at the Irondequoit Town Hall, Irondequoit, New York.

(29) On or about June 28, 1978, JOSEPH J. TRIESTE, DONALD J. PAONE, JOSEPH J. LaDOLCE, JOHN M. TRIVIGNO, John N. Fiorino, Anthony Oliveri and others traveled to the vicinity of the Exit 45 Motel, Victor, New York.

(30) On or about June 28, 1978, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, and Anthony Oliveri traveled to the vicinity of the Exit 45 Motel, Victor, New York.

(31) On or about July 5, 1978, JOSEPH R. ROSSI, ANTHONY M. COLOMBO and Anthony Oliveri traveled to the Exit 45 Motel, Victor, New York.

(32) On or about July 6, 1978, ANTHONY M. COLOMBO killed Thomas Didio at the Exit 45 Motel, Victor, New York.

(33) On or about July 6, 1978, JOSEPH R. ROSSI and Anthony Oliveri left a 1970 Chevrolet in the vicinity of East High School, Rochester, New York.

(34) On or about July 6, 1978, THOMAS E. MAROTTA met

with JOSEPH R. ROSSI and Anthony Oliveri in the vicinity of East High School, Rochester, New York.

(35) On or about September 27, 1978, JOSEPH R. ROSSI, THOMAS E. MAROTTA, DONALD J. PAONE, JOSEPH J. TRIESTE and JOHN M. TRIVIGNO met with Angelo Vaccaro at the Hall of Justice, Rochester, New York.

(36) Sometime in December of 1978, the exact date being to the Grand Jury unknown, SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, THOMAS E. MAROTTA, JOSEPH R. ROSSI, ANTHONY M. COLOMBO, DONALD J. PAONE, JOSEPH J. TRIESTE, JOSEPH J. LaDOLCE, John N. Fiorino, Anthony Oliveri and others met at the home of RICHARD J. MARINO in Irondequoit, New York.

(37) On or about February 4, 1979, RICHARD J. MARINO met with Vincent Rallo.

(38) On or about February 5, 1979, RICHARD MARINO caused Department of Motor Vehicle documents to be prepared reflecting the sale of a 1973 Ford LTD.

(39) On or about March 13, 1979, ANTHONY M. COLOMBO and Anthony Oliveri traveled to the vicinity of Firestone Drive in Gates, New York.

(40) Between on or about March 13, 1979, and on or about March 31, 1979, the exact date being to the Grand Jury unknown, RICHARD J. MARINO had a conversation with Vincent Rallo.

(41) On or about November 5, 1980, RICHARD J. MARINO had a conversation with Vincent Rallo.

(42) On or about February 8, 1981, RICHARD J. MARINO had a conversation with Vincent Rallo at the home of RICHARD J. MARINO in Irondequoit, New York.

(43) On or about February 22, 1981, RICHARD J. MARINO had a conversation with Vincent Rallo at the home of RICHARD J. MARINO in Irondequoit, New York.

(44) On or about March 8, 1981, RICHARD J. MARINO had a conversation with Vincent Rallo at the home of RICHARD J. MARINO in Irondequoit, New York.

(45) On or about January 19, 1982, DONALD J. PAONE and JOSEPH R. ROSSI went to the Yahambas Social Club, 214 Franklin Street, Rochester, New York.

ALL of the foregoing being in violation of Sections 1962(d) and 1963 of Title 18, United States Code.

SALVATORE R. MARTOCHE
United States Attorney
Western District of New York

A TRUE BILL:

FOREMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1367, 1368, 1369, 1370—August Term, 1982

Argued: July 11, 1983 Decided: August 29, 1983

Docket Nos. 83-1054, 83-1055, 83-1056, 83-1069

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, and THOMAS E. MAROTTA,

Defendants-Appellants.

Before:

NEWMAN and WINTER, *Circuit Judges*, and MALETZ, *Senior Judge*.*

* Of the United States Court of International Trade, sitting by designation.

Appeal from an order of the United States District Court for the Western District of New York, Michael A. Telesca, J., 555 F. Supp. 1236, denying motions to dismiss an indictment.

Affirmed.

JOHN F. HUMANN, Buffalo, N.Y. (Richard Miller, Rochester, N.Y., on the brief), *for defendants-appellants Russotti and Marotta.*

HAROLD J. BOREANAZ, Buffalo, N.Y., *for defendant-appellant Piccarreto.*

PAUL J. CAMBRIA, JR., Buffalo, N.Y. (Mary Good and Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., on the brief), *for defendant-appellant Marino.*

KENNETH R. FISHER, Sp. Asst. U.S. Atty., Rochester, N.Y. (Salvatore R. Martoche, U.S. Atty., and Robert L. King, Sp. Asst. U.S. Atty., Rochester, N.Y., on the brief), *for appellee.*

MALETZ, *Senior Judge*:

Defendants-appellants Samuel J. Russotti, Rene Piccarreto, Richard J. Marino and Thomas E. Marotta appeal from an order of the United States District Court

for the Western District of New York, Michael A. Telesca, J., denying their motions to dismiss an indictment filed November 9, 1982. That indictment charges appellants and six others with violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970), commonly known as RICO. *See United States* v. *Russotti*, 555 F. Supp. 1236 (W.D.N.Y. 1983). The grounds for their appeal are essentially threefold. First, appellants Marino and Piccarreto argue that in view of a 1976 RICO prosecution of them the present RICO indictment should be dismissed as violative of the double jeopardy clause. Second, in 1978 a New York State court judgment convicting all four appellants of the 1973 murder of a Vincent J. Massaro was vacated. The inclusion of that homicide as an underlying RICO predicate offense should be barred, appellants contend, because of an alleged joint federal-state effort to procure that conviction. Third, appellants submit alternatively, that since the government knew of the 1973 Massaro homicide prior to the 1976 RICO indictment, the failure to include that offense as a predicate act in that indictment barred the inclusion of the Massaro homicide as a predicate act in the 1982 RICO indictment.

For the reasons appearing below, we find appellants' contentions without merit and, accordingly, affirm the order of the district court.

I

Background

In 1976 the government filed a two-count indictment charging defendants Piccarreto, Marino and six others with a RICO substantive violation, as well as RICO conspiracy, 18 U.S.C. § 1962(c) and (d) (1970).[1] The 1976

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[1] The relevant portions of RICO provide:

§ 1961. *Definitions*

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under . . . the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), . . . section 1503 (relating to obstruction of justice), . . . section 1951 (relating to . . . extortion) . . .;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . . .

§ 1962. *Prohibited activities*

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such en-

indictment alleged that from June 1, 1969 to August 31, 1973, Piccarreto and Marino were members of a criminal enterprise which conspired to commit and did commit multiple acts of arson. They were further charged with having devised a scheme to defraud insurance companies by means of false representations as to the facts and circumstances surrounding the fires. The life of the enterprise allegedly ran from June 1, 1969 to August 31, 1973. The first predicate offense was alleged to have occured on January 26, 1970, and the last on March 17, 1973. On October 7, 1977, a jury returned a verdict of not guilty as to both Piccarreto and Marino.

Also during 1976 all four appellants were convicted in a New York state court of conspiracy in the first degree and murder in the second degree in connection with the homicide of Vincent J. Massaro. However, in 1978 the judgment of conviction was vacated and the indictment dismissed when it was discovered that their convictions had been obtained through the use of perjured testimony of sheriff's deputies. The United States brought civil rights prosecutions against the responsible sheriff's deputies and state prosecutors and secured convictions. It is undisputed that the federal authorities were aware of appellants' alleged involvement in the Massaro homicide at the time the 1976 RICO indictment was filed.

On November 8, 1982 the present RICO indictment was filed against all four appellants and six others charging them with a substantive violation of RICO, 18 U.S.C. § 1962(c), and a conspiracy to violate RICO, 18 U.S.C. § 1962(d). The indictment charges that defendants con-

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terprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection[ ] . . . (c) of this section.

spired to and conducted the affairs of an enterprise through a pattern of racketeering activity which included murder, attempted murder, arson, extortion and obstruction of justice. The pattern of racketeering activity is alleged to have occured from October of 1973 (acts preparatory to the Massaro homicide) to December 17, 1981 (the date of an alleged extortionate act). The life of the enterprise is purported to have run from February 1, 1971 up to the date of the indictment.

With this background we consider at the outset appellants' contention that the dual sovereignty rule is inapplicable to the extent that the 1982 indictment charges appellants with a pattern of racketeering activity which includes as a predicate offense the murder of Vincent Massaro.

II

Dual Sovereignty

Appellants argue that the federal government was so deeply involved in the state murder prosecution as to preclude application of the dual sovereignty rule, at least insofar as the 1982 indictment alleges the Massaro murder as a predicate act of racketeering and an overt act of conspiracy to violate RICO. At a minimum, appellants submit, they are entitled to an evidentiary hearing on this point.

The concept of dual sovereignty is firmly established, and appellants do not take specific issue with it. In addressing the question whether double jeopardy bars a federal prosecution of a defendant already prosecuted for the same act by a state, the Supreme Court answered in the negative in *United States* v. *Lanza*, 260 U.S. 377 (1922):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

Id. at 382. *Accord United States* v. *Wheeler*, 435 U.S. 313, 320 (1978); *Abbate* v. *United States*, 359 U.S. 187, 194 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 129 (1959).

However, the doctrine is not unqualified. "The dual sovereignty doctrine is subject to the qualification . . . that a state prosecution cannot be used merely as a cover and a tool of federal authorities." *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). On this score, appellants argue, the dual sovereignty rule fails here. They contend that the state murder prosecution was merely a cover for the federal authorities who were so substantially involved in the state prosecution that they should not be allowed to relitigate the same issues.

The record shows, though, that in the Massaro prosecution the state and federal authorities were acting independently of one another. The federal authorities ultimately withdrew from the case and the state continued alone. It is true that before this there was a cooperative effort between the state and federal authorities which, appellants insist, completely eroded dual sovereignty. To this contention the district court replied:

> [T]hat factor was present—to some extent—in both *Bartkus* and in *Aleman*, and in both cases the respective courts praised the "cooperation between state and federal authorities [as] a welcome innovation." *United States* v. *Aleman*, at 309; *Bartkus* v. *Illinois*, 359 U.S. at 123, 79 S.Ct. at 678. . . . The cooperation between state and federal police agencies and prosecutorial organizations is both laudatory and desired.

555 F. Supp. at 1239. We agree with the district court and conclude that the dual sovereignty rule is fully applicable here.

Appellants present an associated due process argument that they were improperly denied a hearing on the dual sovereignty question. We find this equally unavailing. First, appellants offered little in the way of proof of federal orchestration of the state murder trial other than the barest conclusory allegations. While two witnesses in the state murder trial were admitted to the federal witness protection program, that fact alone does not transform the Massaro trial into a federal prosecution for jeopardy purposes, there being not the slighest indication that the federal authorities manipulated the state process to accomplish that which they could not constitutionally do themselves. *See United States* v. *Ng*, 699 F.2d 63, 68 (2d Cir. 1983); *United States* v. *Liddy*, 542 F.2d 76, 79-80 (D.C. Cir. 1976). What is more, the uncontradicted affidavit of Special Assistant United States Attorney Robert L. King describing in detail the limited federal involvement in the Massaro murder trial obviated whatever necessity there may have been for conducting a hearing. In sum, the decision of the district court to deny appellants' motion without a hearing was well within its discre-

tion. *See United States* v. *Cohen*, 489 F.2d 945, 951-52 (2d Cir. 1973).

Finally, given our conclusion that there is no reason for ignoring the dual sovereignty rule here, appellants' subsidiary claim of prosecutorial vindictiveness must perforce be rejected. *United States* v. *Ng*, 699 F.2d at 68 ("A setting that involves the conduct of two independent sovereigns does not lend itself to the concept of vindictive prosecution").[2]

We next address the question of the preclusive effect, if any, of the 1976 RICO prosecution on the 1982 RICO indictment in issue here.

III

Former Jeopardy

Appellants Marino and Piccarreto launch somewhat divergent attacks against the 1982 indictment based on the 1976 RICO prosecution, but at bottom all contentions are grounded on claims of double jeopardy or collateral estoppel.[3] Our review is, of course, narrowly circumscribed, given the pretrial status of this appeal. *See Abney* v. *United States*, 431 U.S. 651, 656-62 (1977). The critical double jeopardy inquiry is whether the 1982 indictment

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2 Although it is not entirely clear that this latter claim is properly before the court on the interlocutory appeal, *see United States* v. *Hollywood Motor Car Co.*, ___ U.S. ___, 102 S. Ct. 3081 (1982); *Abney* v. *United States*, 431 U.S. 651, 662-63 (1977), we nevertheless conclude that to the extent that that claim relates to the double jeopardy question it is reviewable by us at this time. *See United States* v. *Wright*, 622 F.2d 792, 793 (5th Cir.), *cert. denied*, 449 U.S. 961 (1980).

3 Inasmuch as appellants Russotti and Marotta were not named in the 1976 indictment, they do not claim former jeopardy based on the 1976 RICO prosecution. We consider appellants' collateral estoppel argument in Part IV, *infra*.

would, in effect, seek to punish Marino and Picarreto for any of the same offenses for which they were tried and acquitted in the 1976 RICO prosecution. *See United States* v. *Solano*, 605 F.2d 1141, 1144 (9th Cir. 1979), *cert. denied sub nom. England* v. *United States*, 444 U.S. 1020 (1980). The answer to this inquiry necessarily depends on what Congress prescribed as the "allowable unit of prosecution." *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1977). "[T]hat prescription determines the scope of protection afforded by a prior conviction or acquittal." *Id.* at 70.

Not surprisingly, appellants and the government take diametrically opposing positions on this issue. Appellants argue that the enterprise is the focal point of RICO, so that acquittal forecloses reprosecution for participation in the same enterprise, even though through a different pattern of racketeering activity. In reaching this conclusion analogize RICO to the crime of conspiracy, with the RICO enterprise being similar to the agreement to engage in criminal conduct, and the pattern of racketeering activity being akin to overt acts. From this, appellants argue, successive conspiracy prosecutions based solely on a different set of overt acts is barred and so too should successive RICO prosecutions where the enterprise is the same.

The government, for its part, counters that it is meaningless to focus exclusively on the enterprise without reference to what it does, citing *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983) ("it is logical to characterize any associative group in terms of what if *does*, rather than by abstract analysis of its structure" [emphasis in original]); and *United States* v. *Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977) ("legislative intent was to make RICO violations dependent upon behavior, not status"). Ac-

cordingly, the government labels the 1976 enterprise as the "arson-for-hire" enterprise, and the 1982 enterprise as the "extortion" enterprise, thereby purportedly distinguishing the two for double jeopardy purposes. Through this conduct-oriented characterization, the government argues, the allowable unit of prosecution is properly established.

In answering the question what is the "allowable unit of prosecution" under RICO, the Supreme Court's opinion in *United States* v. *Turkette*, 452 U.S. 576 (1981), is of particular guidance:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 583 (footnote omitted). Thus, it is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes. Rather, the *combination* of these two elements is the object of punishment under RICO. *See United States* v. *Mazzei*, 700 F.2d 85, 88-90 (2d Cir. 1983); *United States* v. *Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied sub nom. Meinster* v. *United States*, 102 S. Ct. 2965 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.) (pattern of racketeering activity must be done "in the conduct of the affairs of an 'enterprise' "), *cert. denied*, 449 U.S. 871 (1980). Therefore, in order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment. If either is different, there is no infirmity under the double jeopardy clause. *See generally* Note, *RICO and the Liberal Construction Clause*, 66 Cornell L. Rev. 167 (1980).

Instructive in this connection is *United States* v. *Dean*, 647 F.2d 779 (8th Cir.), *modified on other grounds*, 667 F.2d 729 (1981), *cert. denied*, 102 S. Ct. 2296 (1982), where the Eighth Circuit adopted a five factor test for determining whether two RICO counts charge two distinct patterns of racketeering activity. Those factors are

> (1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.

Id. at 788. Applying these five factors to the present case, first, there is an overlap of approximately two and one-half years in the duration of the two enterprises, from February 1, 1971, the beginning of the "extortion" enterprise, and August 31, 19793, the end of the "arson-for-hire" enterprise. However, there is no time overlap as to the predicate offenses alleged in the indictments, the last predicate offense alleged in the 1976 indictment having occurred on March 17, 1973, and the first predicate offense alleged in the 1982 indictment—the Massaro homicide—having occurred in October of 1973.

Second, as to the identity of persons involved in the alleged activities, of the eighteen persons indicted in 1976 and 1982 only two individuals are named in both indictments, Piccarreto and Marino.

Third, the racketeering activities charged in each indictment have only one point of conjunction, that being the allegation of arson. However, the act of arson charged in the 1982 indictment post-dates the last act of arson in the 1976 indictment by some five years. Moreover, the arson charged in the 1982 indictment is allegedly in furtherance of an extortion scheme, not the arson-for-hire scheme which was the focus of the 1976 indictment. In our view, there is no overlap of racketeering activities under the third *Dean* factor.

As to the fourth and most significant factor—the nature and scope of the activity the government seeks to punish under each indictment—as previously indicated the 1976 indictment concerned a scheme to defraud insurance companies by deliberately setting fires to insured buildings. The present indictment, by contrast, is directed at a scheme to extort monies from Rochester, New York gambling clubs, to protect the affairs of the enterprise from "rival and competing individuals" through the use

of threats, murder and arson, and to avoid detection by commiting other illegal acts, including murder and obstruction of justice. There is plainly no convergence of the two indictments in this regard.

Fifth, and finally, the place where the illegal activity took place in both indictments did center around the Rochester, New York area.

Having considered and applied the five *Dean* factors, the unavoidable conclusion is that the two indictments allege distinct patterns of racketeering activity. Even assuming an identity of the enterprises, in view of our conclusion that there are two distinct patterns of racketeering present here, the prosecution of Piccarreto and Marino does not offend the double jeopardy clause. Taken to its logical extreme, appellants' argument that the allowable unit of prosecution under RICO is the enterprise would effectively immunize members of that enterprise from any future prosecution following an initial RICO prosecution, regardless of the nature of the subsequent misconduct.

Withal, we are not insensitive to appellants' concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts—sufficient to establish a pattern of racketeering activity under 18 U.S.C. § 1916(5)—and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise.[4] Indeed,

[4] In *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), court noted that "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." *Id.* at 395-96. This court went on to caution strongly against "undue prosecutorial zeal in invoking RICO," *id.* at 396. *See also United States* v. *Weisman*, 624 F.2d at 1123. *See generally* Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 Calif. L. Rev. 724 (1982).

appellants contend, an example of just that is presented here with the government's inclusion of the Massaro homicide as a predicate act in the 1982 indictment when the government in fact knew or should have known of that homicide at the time it filed its 1976 indictment. Thus, appellants submit, the Massaro homicide should have been included in the 1976 RICO indictment or not at all. However, the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme*—a scheme which had no relationship to the 1976 arson-for-hire activity.

In short, we are satisfied that the RICO indictment in the present case passes muster under the five *Dean* factors.

Appellants' further argument that RICO is analogous to the crime of conspiracy must fail, for here there exist two distinct criminal endeavors, one whose purpose was to obtain monies through arson for hire and insurance fraud, the other to obtain monies through extortion. Thus, the same group which during the same period of time organizes into different enterprises in order to consummate distinct patterns of racketeering activity may be prosecuted for each without trenching upon the constitutional guarantee against double jeopardy. *See United States* v. *Bagaric*, 706 F.2d at 55 ("the nature of the misconduct often provides the best clue toward defining the enterprise"); *United States* v. *Weisman*, 624 F.2d at 1123. *See also United States* v. *McDonald*, 692 F.2d 376 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1531 (1983); *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). *Cf. Braverman* v. *United States*, 317 U.S. 49 (1942).

IV

Collateral Estoppel

We consider finally the contention that in light of the 1976 RICO acquittal the government is collaterally estopped from relitigating those issues which were resolved in favor of Marino and Piccarreto

The starting point for determining this collateral estoppel issue is *Ashe* v. *Swenson*, 397 U.S. 436 (1970). In *Ashe* the Supreme Court held that the doctrine of collateral estoppel, as applied to criminal proceedings precludes the government from relitigating an issue of ultimate fact involving the same parties that was *necessarily* determined in favor of a defendant. *Id.* at 444. The burden is on defendants to show that the verdict in the 1976 RICO prosecution decided the very issue now in litigation. *United States* v. *Mespoulede*, 597 F.2d 329, 333 (2d Cir. 1979); *United States* v. *Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). Our task is to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444.

Here, Marino and Piccarreto contend that their 1977 acquittal on RICO charges necessarily means that the jury concluded that they were not members of the enterprise. However, as the government submits and as a fair reading of the 1982 indictment indicates, that indictment charges defendants with membership in an enterprise wholly different from that described in the 1976 indictment. Further, without engaging in a hypertechnical construction of the jury's verdict, *United States* v. *Mespoulede*,

597 F.2d at 333, there exists a "plausible explanation[ ] for the jury's failure to convict," *United States* v. *King*, 563 F.2d 559, 561 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978), even assuming that the enterprise in each indictment is the same. The acquittal of Marino and Piccarreto could have been the result of a jury determination that while they were members of the enterprise, they did not participate in the arson-for-hire or insurance fraud schemes. As for their acquittal on the RICO conspiracy count, even assuming that the jury concluded that they were not members of the enterprise, this does not preclude a subsequent conspiracy conviction, provided the two conspiracies are distinct criminal schemes. *United States* v. *Sturman*, 679 F.2d 840, 844 & n.9 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 816 (1983); *United States* v. *Papa*, 533 F.2d 815, 822 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976). Here, there is "nothing to suggest that the success of one [conspiracy to commit one particular scheme] was in any way dependent upon or related to the other" conspiracy. *Papa*, 533 F.2d at 822.

In brief, at this stage of the proceedings, we fail to see any indication of an attempt by the government "to persuade a second jury of the same fact already litigated" in defendants' favor. *Mespoulede*, 597 F.2d at 335. On this record, the government is thus not barred from charging Marino and Piccarreto with either a new RICO conspiracy or a new substantive RICO offense.

V

For the foregoing reasons, the order of the district court denying appellants' motions to dismiss the indictment is affirmed.